
No. 12719

IN THE

United States

Court of Appeals

FOR THE NINTH CIRCUIT

UNITED TRUCK LINES, INC.,

Appellant,

vs.

INTERSTATE COMMERCE COMMISSION

Appellee.

No.
12719

*Appeal from the United States District Court
Eastern District of Washington
Northern Division*

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

Appellee is not satisfied that a clear and accurate statement of the case and issues is contained in appellant's brief. Therefore, the following is submitted:

STATEMENT OF THE CASE

This appeal is from the order and judgment of the District Court of the United States for the Eastern District of Washington,, Northern Division (Honorable Sam M. Driver, District Judge), entered September 20, 1950, permanently enjoining defendant-appellant, United Truck Lines, Inc., a common carrier by

motor vehicle, from transporting property for compensation in interstate commerce by motor vehicle on public highways designated as U. S. No. 30, between Boise, Idaho and Pasco, Washington, except as authorized by a certificate of public convenience and necessity or other appropriate authority issued by the Interstate Commerce Commission.

The action was initiated by complaint filed by the appellee Commission on February 28, 1950, under authority of Sections 204(a) and 222(b) of the Interstate Commerce Act (Title 49, U. S. Code, Sections 304(a) and 322(b)) and under the general laws and rules relative to suits in equity arising under the Constitution and laws of the United States. An answer was made by defendant on March 16, 1950. Reply to the answer was filed by the plaintiff-appellee on May 15, 1950. A motion for summary judgment was filed by plaintiff-appellee on August 18, 1950, and a permanent injunction was granted, effective 12 o'clock Noon, September 20, 1950. On the same date defendant filed a notice of appeal (28 U.S.C., Sec. 1291) from the judgment, and a motion to stay the execution thereof, which motion was granted. No written opinion was rendered by the District Court.

STATEMENT OF THE FACTS

Appellant, a Washington corporation, organized on September 28, 1933, has extensive operating authority as a common carrier in the Pacific Northwest Territory described in appellant's Exhibit "A" (R. 14-34). The only portions thereof relevant to this case concern the authority issued to it by the Interstate Commerce Commission in the following instances:

A certificate was issued March 27, 1944, in Docket No. MC-7746, authorizing transportation of general

commodities between Portland, Oregon and Spokane, Washintgon, over a regular route, as follows:

From Portland over U. S. Highway 99 to Vancouver, Washington, thence over U. S. Highway 830 to Maryhill, Wash., thence over U. S. Highway 97 to Toppenish, Wash., thence over Unnumbered Highway to Zillah, Wash., thence over *U. S. Highway 410 to Pasco, Wash.*, and thence over U. S. Highway 395 to Spokane, and return over the same route. (Emphasis added).

Service is authorized to and from the intermediate points of Kennewick, Pasco, Connell, Lind, Ritzville, Sprague, and Cheney, Washington.

In Docket No. MC-7746, Sub. No. 18, a certificate was issued February 25, 1948, authorizing transportation of general commodities between Spokane, Washington and Boise, Idaho, over a regular route, as follows:

From Spokane, Washington, over U. S. Highway No. 195, through Pullman, Wash., to junction of U. S. Highway No. 95 (also from Pullman, over Washington State Highway No. 8 to Moscow, Idaho, and thence over U. S. Highway No. 95 to junction of U. S. Highway No. 195), thence over over U. S. Highway No. 95 to junction of U. S. Highway No. 30 near Fruitland, Idaho, thence over U. S. Highway No. 30 to Boise, Idaho, and return over the same route.

In Docket No. MC-7746, Sub 22, a certificate was issued April 18, 1949, permitting appellant to transport general commodities, with the usual exceptions, as follows:

Service is authorized to and from points in Grant, Lincoln, Franklin, Adams, and *Benton* Counties, as intermediate and off-route points in connection with said carrier's authorized regular-route operation. (Emphasis supplied).

Paragraph III of the complaint alleges that appellant from July 1, 1949, up to and including the date of the filing of the complaint, engaged in the transportation of property for compensation in interstate commerce, by motor vehicle, over portions of the public highway designated as U. S. No. 30 between Boise, Idaho and Pasco, Washington. Appendix "A" attached thereto listed eight representative instances of operations conducted by appellant over that route, all of which were performed outside the scope of the certificate issued to appellant in Docket No. MC-7746 and Sub Nos. 18 and 22, in violation of Section 206(a) of the Interstate Commerce Act (49 U.S.C., 306(a)).

THE QUESTION AT ISSUE

Appellant admits that it has been operating between Pasco, Washington and Boise, Idaho, over U. S. Highway No. 30, and in support of its position that such operations are lawful contends that the city of Pasco, in Benton County, Washington, is an off-route point to its otherwise authorized operations—namely its regular-route operations between Spokane, Washington and Boise, Idaho. Appellee, on the other hand, denies that any of the certificates described in appellant's Exhibit "A" (Tr. 14-34) authorized appellant to perform transportation between Boise, Idaho and Pasco, Washington, over U. S. Highway No. 30, and denies that Pasco is an off-route point in connection with appellant's authorized regular-route operations between Boise, Idaho and Spokane, Washington.

The sole question before the court, therefore, is whether appellant is authorized to operate over U. S. Highway No. 30, between Boise and Pasco (in lieu of operating over its authorized regular routes between Boise and Portland via Spokane) on the theory

that Pasco is an off-route point in connection with appellant's authorized regular-route operations between Boise and Spokane.

ARGUMENT

By reference to appellant's certificate No. MC-7746, conferring rights to operate over the route between Portland, Oregon and Spokane, Washington, it will be noted that Pasco, Washington, is described as an intermediate point on U. S. Highway 410. The certificate states (Tr. 17):

Service is authorized to and from the intermediate points of Kennewick, *Pasco*, Connell, Lind, Ritzville, Sprague, and Cheney, Washington. (Emphasis supplied).

Appellant's certificate No. MC-7746, Sub. 22, grants authority by using the following language (Tr. 27):

Service is authorized to and from points in Grant, Lincoln, Franklin, Adams and *Benton* Counties, Wash., as intermediate and *off-route* points in connection with said carrier's otherwise authorized regular-route operations. (Emphasis added).

As we understand appellant's position, it contends that Pasco, which is in Benton County, Washington, is an off-route point in connection with its authorized regular-route between Portland and Spokane, and that it is authorized to serve Pasco by virtue of the last-quoted certificate above. The Commission (appellee) denies that contention, and the issue thus joined presents the principal question now before the court.

The weakness which is immediately apparent in appellant's position is that it is based upon the false hypothesis that Pasco is an "off-route point in connection with said carrier's otherwise authorized regu-

lar-route operations". Pasco is not an off-route point in any sense. On the contrary, appellant's certificate No. MC-7746 specifically names Pasco as one of the intermediate points (that is, an on-route point) which appellant is authorized to serve on its authorized route between Portland and Spokane (Tr. 17).

Appellant contends, however, that it is also authorized to serve Pasco as an off-route point in connection with its authorized regular-route operations between Boise and Spokane. In performing through transportation between Boise and Portland it has been operating over U. S. Highway 30 between Boise and Pasco, under its claim that Boise is an "off-route point" in connection with its Boise-Spokane operations, and its doing so constitutes the basis for this action.

On pages 14 and 15 of its brief, appellant has set forth what it terms "Rules of Commission Governing Routes to Territories". To the extent that it creates the impression that formal rules have been adopted, appellant's statement is in error. No such rules, or any other rules or regulations on the subject, have been prescribed by the Commission. The so-called rules set forth in appellant's brief appear to have been copied from informal opinions expressed in communications from one employee of the Commission to another, as indicated by the file reference "L-21277 March 30, 1949". It goes without saying that such expressions are in no sense "rules of the Commission," having the force and effect of law.

In fact, appellant admits at another place in its brief (page 13) that no rules and regulations defining "off-route points" have been prescribed by the Commission. With that statement we fully agree. Moreover, we insist that there is no need for such rules. The Commission, in its formal decisions on motor

carriers' applications for operating rights, has many times defined the term "off-route point". For that reason the term has a technical and well understood meaning in the motor carrier industry. Appellant's certificates should be interpreted in accordance with that meaning. *Black v. Interstate Commerce Commission*, 167 F. (2d) 825, and authorities there cited.

Before mentioning any of the Commission's decisions in which the term "off-route point" was defined, we desire to mention a well-known principle of statutory construction. It is that the interpretations placed upon provisions of the Interstate Commerce Act by the Commission (which the courts have stated possesses special competence in this field) are entitled to great weight and respect and will not be overturned unless they are arbitrary or plainly erroneous. *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 402; *Brewster v. Gage, Collector of Internal Revenue*, 280 U. S. 327, 336. In one case it was stated that "the Commission's construction (of a certificate), unless clearly erroneous or arbitrary, must be accepted by the courts". *Adirondack Transit Lines, Inc. v. United States*, 59 F. Supp. 503; affirmed by the Supreme Court, 324 U. S. 824.

We shall next refer to a few of the Commission's decisions dealing with the authority of motor carriers to serve off-route points.

In *Dixie Freight Lines, Inc. Extension Application*, 29 M.C.C. 406, the Commission stated:

An off-route point is one usually served by line-haul equipment *making a short side trip and returning* as soon as possible to the regular route or schedule. (Emphasis added).

In deciding the application of *System Arizona Express Service, Inc.*, 4 M.C.C. 129, 131, the Commission stated:

Most of the so-called off-route points in Arizona are so far off-route as to lose their status as such. An off-route point usually is one served by line-haul equipment making a short side trip and returning as soon as possible to its regular route and schedule. When asked as to the extent of departure from the regular routes in the performance of off-route service past and proposed, applicant's manager suggested that such service would relate to hauls of 150 miles from regular routes. *Obviously, such service is not off-route service as that term ordinarily is used * * ** The authority granted herein will include authority to serve off-route points in Arizona west of Phoenix which are between U. S. Highways 60 and 80; or which are not more than 25 miles north of U. S. Highway 60, or not more than 25 miles south of U. S. Highway 80. (Emphasis added).

Again, in *Los Angeles-Seattle M. Express, Inc.*, 24 M.C.C. 141, 145, the Commission said:

San Diego, California, is situated too far distant from Los Angeles to be termed an off-route point.

It necessarily follows from these decisions that an off-route point must be situated within a reasonably short distance from the route to which it is appurtenant. Can it be said, then, that Pasco is such an off-route point in connection with appellant's authorized route between Boise and Spokane? Let us consider the facts in this connection.

The route over which appellant is authorized to operate between Boise and Spokane is described in the certificate by reference to certain numbered highways (Tr. 22), and service is authorized to and from certain specified intermediate points on said route and one named off-route point, but not to or from Pasco. In serving Pasco (under the claim that it is an off-route point in connection with appellant's Boise-Spokane

regular-route operations), appellant admittedly has been operating over U. S. Highway 30 between Boise and Pasco. From a Rand McNally road map it appears that Pasco is more than 200 miles distant by highway from the point where appellant's vehicles leave its Boise-Spokane authorized route in order to serve Pasco as an off-route point. The round-trip distance (from the point of departure from the Boise-Spokane authorized route to Pasco and return) is more than 400 miles. May such a departure be regarded as "a short side trip"? Merely to ask the question is to disclose the unreasonableness of appellant's contention.

In this connection it is worth noting that the Commission has many times held that "off-route point authority is not severable from the route or routes to which it is commonly appurtenant". *Knox M. Service, Inc.—Purchase—J. Bedford M. Service, Inc.*, 36 M.C.C. 713; *Norwalk Truck Line Co.—Purchase—Midwest M. Freight Co.*, 37 M.C.C. 376.

Appellant asserts that the effect of the decision of the district court is to read into its certificate No. MC-7746, Sub 22, a restriction which the certificate does not contain. While the certificate does not specifically restrict the distance to which appellant may travel in serving off-route points, the certificate must be read in the light of the well understood meaning of the term "off-route points" as declared by the Commission and as indicated above. Moreover, "it is not the function of a certificate to enumerate the operations which may not be performed". *Gay's Express v. Haigis & Nichols*, 43 M.C.C. 277, 280. Under the provisions of Section 208(a) of the Interstate Commerce Act (49 U. S. Code 308(a)), a certificate is required only to specify the services which the carrier

may perform thereunder, not those which he is forbidden or restricted from performing.

Appellant also contends (page 15 of its brief) that the wording of its certificate is such that service is authorized to and from any of the points in the five counties as intermediate and off-route points in connection with its authorized regular-route operations, and implies that the word "operations" includes all its operations over whatever route is the most practical and shortest. This argument, likewise, has no foundation because, as demonstrated above, Pasco is an "on-route" point and therefore cannot be classified as off-route.

The unauthorized operations in which appellant has been and is engaged are substantial. There is nothing trivial about them. They amount to much more than merely transporting an occasional shipment from Boise to Pasco or from Pasco to Boise over U. S. Highway 30. Under appellant's claim that it has the right to serve Pasco as an off-route point in connection with its Boise-Spokane regular-route authority, it has been conducting its through operations between Boise and Portland over U. S. Highway 30, rather than over the much longer route it is authorized to traverse from Boise to Spokane to Portland, and vice versa. Its said operations over the shorter route not only constitute unfair and unlawful competition with motor carriers holding authority to operate over that route, but present the question whether a carrier such as appellant shall be permitted to engage in interstate operations over a cut-off or alternate route without first obtaining the authority which the statute requires it to have.

This is not a situation wherein the Commission is arbitrarily insisting that appellant operate over the longer (and perhaps less economical) route. Upon

appellant's filing a proper application and making proof of public convenience and necessity for such authority, the Commission would grant appellant a certificate authorizing it to operate over the alternate shorter route. Many such applications have been considered by the Commission, and the desired authority has been granted whenever the Commission found that the proof met the statutory requirements. *David C. Hall, Extension*, 44 M.C.C. 104; *Interstate Dispatch, Inc., Extension*, 30 M.C.C. 763; *Dixie Freight Lines, Inc., Extension*, 29 M.C.C. 406.

One other point deserves mention. There seems to be at least a suggestion in appellant's argument that it did not *know* the limits of its operating authority and that it should no be charged with knowledge of the Commission's decisions, *supra*, in which the term "off-route point" was defined. The obvious answer to that suggestion is that this is a civil action, not a criminal prosecution, and no question as to appellant's knowledge or wilfulness is involved. It was not and is not necessary, in order to sustain the judgment of the trial court, for the evidence to show that appellant *knew* it was without authority to engage in the questioned operations. Had a criminal prosecution been brought against appellant under Section 222(a) of the Interstate Commerce Act (49 U. S. Code, 322(a)), it would have been necessary, in order to convict, to prove that appellant "knowingly and wilfully" operated without authority or beyond the scope of its authority. But Section 222(b) of the Act, under which this civil action for injunction was brought, does not require a showing of knowledge or wilfulness on the part of the offending person. There is no relevancy, therefore, in any suggestion that appellant did not know the limits of its authority and for that

reason may have exceeded them unintentionally. If it has been and is continuing to engage in unauthorized operations, even under a mistaken belief that they were authorized by its certificates, the action of the trial court in granting the injunction was proper.

CONCLUSION

We submit that under the undisputed facts and the applicable law, the appellant, in transporting property over U. S. Highway No. 30 between Boise, Idaho and Pasco, Washington, has been and is engaging in unauthorized operations, in violation of the Interstate Commerce Act, and that the judgment of the lower court enjoining appellant from continuing to engage in such operations was without error and should be affirmed.

Respectfully,

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Attorneys for Appellee.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing brief upon the appellant by mailing copies thereof to its attorneys of record, Messrs, Reilly and Cael, 603-604 Columbia Building, Spokane 8, Washington.

This, the _____ day of _____, 1951

Of Counsel for Appellee.

